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What kind of restraint or forbearance should one expect – and demand – from opposing counsel when it comes to interviewing your clients' current and former employees? First, you may expect opposing counsel to disclose early and clearly to any such person her interest in the matter. See Rule 4.3, W. Va. R. Prof. Conduct.[1] Next, you may expect opposing counsel to ask your client's employee or former employee on the front end of the conversation whether he or she is represented by counsel in connection with the matter. See Rule 4.2, W. Va. R. Prof. Conduct. If the employee *is* represented, your opposing counsel may not proceed without the consent of the interviewee's lawyer. Id. ("[A] lawyer shall not communicate about the subject of the representation with a [person][2] the lawyer knows to be represented . . . [without] the consent of the other lawyer[.]").

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[1] She is further obligated to correct any apparent misunderstandings about her role. See id.

[2] Though the West Virginia rule actually uses the word "party" rather than "person," which is the term used in the Model Rule, the Comment to West Virginia's Rule 4.2 clarifies that the

Rule 4.2 of the Rules of Professional Conduct, often called the "anti-contact rule," applies even if a represented employee or former employee initiates a communication with opposing counsel or consents to it, see Model Rule 4.2, Cmt. 3, which means, in effect, that a represented person *cannot* consent to the communication and that only his or her lawyer can. Rule 4.2 is designed to protect people who have chosen to be represented from possible overreaching by other lawyers. See id. at Cmt. 1 & see State ex rel. State Farm Fire & Cas. Co. v. Madden, 192 W. Va. 155, 451 S.E.2d 721 (1994) (citing Dent v. Kaufman, 185 W. Va. 171, 174, 406 S.E.2d 68, 72 (1991)).

We begin an analysis of the anti-contact rule as it relates to an entity's employees or other constituents with the Comment to Model Rule 4.2, which explicitly addresses whether *current* entity constituents are considered "represented." Section 7 provides that "[i]n the case of a represented organization, this Rule prohibits communications with a constituent . . . who [a] supervises, directs or regularly consults with the organization's lawyer concerning the matter or [b] has authority to obligate the organization with respect to the matter or [c] whose act or omission in connection with the matter may be imputed to the organization." Similarly, the West Virginia rule Comment reads:

> In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation [a] with persons having managerial responsibility on behalf of the organization, and [b] with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or [c] whose statement may constitute an admission on the part of the organization.

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rule "covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question."

In Dent v. Kaufman, 185 W. Va. 171, 406 S.E.2d 68 (1991), the Supreme Court of Appeals of West Virginia was asked to decide whether all employees of a corporate defendant were considered "parties" for purposes of Rule 4.2. There the Court held that a corporate "party," in the Rule 4.2 context, included only (a) those officials having the legal power to bind the corporation in the matter, (b) persons responsible for implementing the advice of the corporation's lawyer, or (c) any member of the organization whose own interests were directly at stake. Syl. Pt. 2, Dent. Interestingly, the case upon which Dent relied, Niesig v. Team I, 76 N.Y.2d 363, 559 N.Y.S.2d 493, 558 N.E.2d 1030 (1990), which has been cited favorably in both subsequent West Virginia explications of Rule 4.2 as it concerns current employees (both in federal court),[3] observed that "[t]he test that best balances the competing interests, and incorporates the most desirable elements of [all] other approaches, is one that defines 'party' to include [1] corporate employees [a] whose acts or omissions in the matter under inquiry are binding on the corporation (in effect, the corporation's 'alter egos') or [b] imputed to the corporation for purposes of its liability, or [2] employees implementing the advice of counsel." 76 N.Y.2d at 374, 559 N.Y.S.2d at 498, 558 N.E.2d at 1035.

These three descriptions of (and Neisig's comment on) those who may qualify as an entity client's *represented* current employees/constituents for purposes of the anti-contact rule may be loosely aligned and visualized as follows:

[3] See Cole v. Appalachian Power Co., 903 F.Supp. 975, 977 (S.D. W. Va. Jul. 13, 1995); Branham v. Norfolk and Western Ry. Co., 151 F.R.D. 67, 69 (S.D. W. Va. Aug. 27, 1993).

Model Rule 4.2, Comment	**W. Va. Rule 4.2, Comment**	**Dent v. Kaufman**	**Neisig v. Team I** (dictum)
supervises, directs, or consults with lawyer		implementing advice of corporation's lawyer	implementing the advice of counsel
has authority to obligate the organization	has managerial responsibility	has legal power to bind the corporation	
whose act or omission may be imputed to the organization	whose act or omission may be imputed to the organization		whose acts or omissions in the matter under inquiry may be imputed to the corporation for purposes of its liability
	whose statement may constitute an admission		
		whose own interests are directly at stake	whose acts or omissions in the matter under inquiry are binding on the corporation (in effect, the corporation's 'alter egos')

Easily discernible are overlaps and disparities between and among these sources. For example, the comments to the rule do not explicitly recognize as being represented one whose own interests are directly at stake, though one whose interests are directly at stake (say, a shareholder of a closely held corporation) certainly may fall into one of the comments' categories (i.e., having managerial responsibility or being in a position to bind the organization with his or her acts or omissions through a theory of vicarious liability). Only one qualifying situation would seem to be needed to trigger the protection of the anti-contact rule, but the criteria posed are not always easy to apply. For example,

"having managerial responsibility" (see Cmt. to W. Va. R. Prof. Conduct 4.2) by itself probably does not place the anti-contact rule into effect unless that responsibility bears some relation to the matters at issue (unless other privilege issues inure).

The identification of a constituent who is considered, by virtue of his or her position and/or involvement in surrounding facts, to be represented may be discerned through what is sometimes called the "managing-speaking agent" test, which differentiates those high level employees having the power to speak for and bind the organization on matters at issue in the litigation from those who do not. Courts and ethics commissions have also recognized an "imputed action test," which recognizes as represented those constituents having a managerial responsibility on behalf of the organization and whose acts or omissions or admissions may be imputed to the corporation or government for purposes of civil or criminal liability (to be distinguished from those "rank-and-file" employees who are nothing more than carriers out of instruction or eye witnesses).[4] But do these same contact prohibitions extend to former

[4] Temporary employees and independent contractors may well fall into the "represented" class. One source suggests that whether these persons are sufficient corporate "insiders" to qualify as the functional equivalent of a regular employee for purposes of a Rule 4.2 analysis should turn on whether the agents "(1) possess decision-making responsibility regarding the matter about which legal help is sought, (2) are implicated in the chain of command relevant to the subject matter of the legal services, or (3) are personally responsible for or involved in the activity that might lead to liability for the corporation." Paul R. Rice, Attorney-Client Privilege in the United States, § 4:19 (March 2008) (Westlaw database) (citing John E. Sexton, A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege, 57 N.Y.U. L. Rev. 443, 500 (1982)). Courts also struggle to define the word "party" in the government context. See, e.g., American Canoe Ass'n, Inc. v. City of St. Albans, 18 F. Supp. 2d 620, 621–22 (S.D. W. Va. 1998) (permitting contact with government employees and managers, but barring access to attorney-client privileged information and work product).

constituents/employees? According to West Virginia precedent, they do not; though there are arguments to be made that in certain situations, they should.

Neither Model Rule 4.2 nor West Virginia Rule 4.2 makes reference to former constituents. Comment 7 to Model Rule 4.2 states, however, that "[c]onsent of the organization's lawyer is not required for communication with a former constituent," suggesting no barrier to an *ex parte* communication by opposing counsel where a former employee is unrepresented (though his former employer is). While the anti-contact rule technically does not extend to former employees, significant limitations persist, with prohibitions, duties, and ethical lines requiring an abundance of care by your opposing counsel (or by you, should your opponent happen to be an organization).[5]

The Supreme Court of Appeals has considered whether Rule 4.2 applies to former employees. State ex rel. Charleston Area Medical Center v. Zakaib, 190 W. Va. 186, 437 S.E.2d 759 (1993), using an analysis of the lines established in Dent v. Kaufman for interviewing current employees, holds simply that Rule 4.2 is not designed to foreclose *ex parte* interviews of former employees unless they are represented by their own attorney.[6] In dissecting Zakaib, which is somewhat lacking in substance and analysis,

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[5] As discussed infra, the interviewing attorney must disclose her interest in the matter. Further, she must exercise all due caution to avoid eliciting privileged information, particularly when dealing with lay persons. She cannot advise the interviewee except to suggest, should personal liability be suspected, that the interviewee may want to retain counsel.

[6] The Zakaib decision relies partially on ABA Formal Opinion 91-359, which determined that Rule 4.2 did not extend to former employees, including managerial employees. See 190 W. Va. 186, 191, 437 S.E.2d 759, 764. Given that "the effect of the Rule is to inhibit the acquisition of information about one's case," the ABA Committee was loath to interpret the text of the model rule liberally (id. at n.6 [citing reference omitted); therefore, it opined that opposing counsel could communicate with a represented organization's former employees, including

once must return to Niesig v. Team I and its observation that any construction of Rule 4.2 must balance the competing interests of informal discovery and the integrity of the attorney-client relationship. See 76 N.Y.2d at 371. Niesig and Dent explain that the anti-contact rule, while applicable to employees whose acts or omissions "caused the event leading to the action (whose negligence may be imputed to the organization or alter egos, whose acts or omissions are binding on the organization), does not apply to mere employee witnesses who could, at worst, make statements against the organization's interest.[7] ("No matter how damning" the employee witness's testimony might be, it cannot not be considered an admission by the organization. See Dent at 176, 406 S.E.2d at 73.) In other words, our Court's analysis of Rule 4.2 in the context of current employees carefully distinguishes between employees who can bind the organization and those who cannot.

Further, for purposes of fully understanding Zakaib, it is significant to note that Dent adopted Niesig's *variation* on the managing-speaking agent test, which extends the anti-contact rule to employees whose acts or omissions caused the event leading to the

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managers, without the organization's lawyer's consent within the confines of Rule 4.3, which was deemed protective enough of the process (see id.).

[7] Dent rejects an approach to Rule 4.2 that would prohibit *ex parte* contact with former employees whose statement could constitute an admission on the part of the organization. 185 W. Va. at 176, 406 S.E.2d at 73. The Court observed that under Rule 801(d)(2)(D), W. Va. R. Evid., only a statement by a party's agent or servant concerning a matter within the scope of the agency or employment and made during the existence of the relationship may be offered as an admission against that party and will not be prohibited as hearsay. Since a former employee or constituent was no longer an agent or servant of the organization, it reasoned, he or she could not bind the organization with an admission. Id. at 175-76, 406 S.E.2d at 72-73.

action, see Branham v. Norfolk & Western Ry. Co., supra, fn. 2, 151 F.R.D. at 69,[8] whereas other courts adopting the managing-speaking agent test have found "no reason to distinguish between employees who [] witnessed an event and those whose act or omission caused the event leading to the action." Id. at 69, n.13 (quoting Wright v. Group Health Hospital, 103 Wash.2d 192, ___, 691 P.2d 564, 569 (1984)). So Dent, discussing an organizational defendant's current employees or constituents, relies on a case (Niesig) that recognizes a difference between being a mere witness and being a *participant*, whose act or omissions are susceptible to the doctrine of *respondeat superior*.

In the end, the nearest the Zakaib decision gets to recognizing a situation in which an otherwise unrepresented former employee should not be interviewed *ex parte* by opposing counsel is in footnote 5, where it states that "[c]onceivably, if a former employee, while employed in a position covered by Dent, made a statement covered under Rule 801(d)(2)(D) of the Rules of Evidence, and such statement was subsequently revealed during an *ex parte* interview, it would be protected under Dent." 190 W. Va. at 190, n. 5, 437 S.E.2d at 763, 75. Other cases have gone further, and presented with the right facts, the Supreme Court of Appeals might well go there, too.

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[8] To be clear, added to the managing-speaking agent (with variation) rule set out in Niesig are employees implementing or effectuating the advice of counsel and employees who are "so closely identified with the interests of the [organization] as to be indistinguishable from it." 559 N.Y.S.2d at 498-99, 558 N.E.2d at 1035-36. Among the latter would fall owners, partners, joint venturers, class members, trust beneficiaries, etc. See Cole, supra, fn. 2, at 978 (citing Wolfram, Modern Legal Ethics, § 11.6, at 613 n.47).

Despite the Court's ruling in Zakaib, there is an argument to be made that Rule 4.2 should extend to former employees who qualify as alter egos of the organization or whose past negligence may be imputed to the organization through *respondeat superior*, even where they are no longer formally affiliated with the organization and are not named parties to the action. As the Kentucky Supreme Court recognized in Humco, Inc. v. Noble, 31 S.W.3d 916 (Ky. 2000) (holding that Rule 4.2 does not extend to former employees having no present relationship with the organizational party), Rule 4.2, though not meant to prevent the free flow of information, *is* clearly designed "to preserve the position of the parties in the adversarial system and thereby to maintain the protection obtained by employing counsel and prevent disruption of the attorney-client relationship." Id. at 920. The risk of overreaching, particularly with former constituents who may not understand their ability to bind the company, and the interest in preserving the parties' positions, though perhaps not as compelling as the attorney-client privilege, are important considerations that may support a prohibition on *ex parte* contacts by opposing counsel with your client's former employees.

If the former employee were named and had allegedly acted in a liability-producing way within the scope of employment, presumably the company would indemnify, defend, or at least support and back that individual. Generally, the organization's and the former employee's interests will not be at odds, so the representation usually will be a joint representation (for uniformity, efficiency, and economy's sake). So why, the former employee having not been named as a defendant,

should the managing-speaking agent rule for that employee be any different just because he is no longer employed?

One argument made that the protection should *not* apply is that the organization's attorney-client privilege is not implicated. The organization's attorney-client privilege is not implicated if there has been no communication between the organization's counsel and the former employee during which advice was offered or elicited, but what if the former employee sought advice from the organization's attorneys about the matter at issue while employed? What if the former employee would seek advice and counsel (i.e., representation) from the organization's current counsel if he only knew he could? Doesn't the rationale for the anti-contact rule (i.e., to preserve the proper functioning of the legal system and to shield the adverse party from improper approaches, see ABA Comm. on Ethics & Prof. Responsibility Formal Opinion 359 (1991)) stand up to scrutiny in these circumstances and overcome the interest in "open" discovery?

Even courts holding that Rule 4.2 does not apply to former employees stress that extra care must be taken when interviewing former employees; for example, they cannot discuss privileged information to which they were privy. See Thorn v. Sonstrand Corp., No. 95C50099, 1997 WL 627607 (N.D. III October 10, 1997); Jenkins v. Wal-Mart Stores, Inc., 956 F.Supp 695 (W.D. La. 1997). But others have gone further to impose contact limitations not set out directly in, but arguably supported by, Rule 4.2. Specifically, the Arizona Court of Appeals recognized in Lang v. Superior Court, 170 Ariz. 602, 826 P.2d 1228 (Ct. App. 1992) that of the categories recognized in Dent, one

of three does not, like the others, necessarily contemplate some current connection to the organization. Id. at 1230-33.

	Current	Past
• Managerial responsibility	X	
• Imputed act or omission	X	X
• Person whose statement may constitute an admission	X	

It concluded that Rule 4.2 prohibits *ex parte* contact with former employees if their act or omission gave rise to the underlying litigation or the former employee "has an ongoing relationship with the former employer in connection with the litigation." Id. at 1233.[9] Similarly, Andrews v. Goodyear Tire and Rubber Company, Inc. holds that former employees may be in an organization's litigation control group, such that *ex parte* interviews of them by opposing counsel are prohibited. 191 F.R.D. 59 (N.J. 2000) (reciting significant revisions to Rules 4.2, 4.3, and 1.13 that support the decision).

Statements of former employees who were directly involved in the subject matter of the litigation, the Massachusetts Superior Court decided in 2001, could constitute admissions and their acts could be imputed to the organizational defendant; therefore, a protective order would issue to prohibit *ex parte* contacts. Clark v. Beverly Health & Rehab Services, Inc., No. 990163B, 2001 WL 914195 (Mass. Super. July 5, 2001). Though that decision was vacated in 2003, the Supreme Judicial Court of Massachusetts

[9] The latter category could encompass employees retained or re-hired for the limited purpose of defending litigation or who have earlier committed to being available for same.

allowed the prohibition to stand as to former employees having some relationship with the organization other than that of former employee or former agent. Clark v. Beverly Health & Rehab Services, Inc., 440 Mass. 270, 797 N.E.2d 905 (2003).[10] A federal court in Florida distinguished between (1) "rank and file" former employees and (2) more exalted former employees – including (a) management, (b) those working with attorneys, and (c) those with access to privileged or confidential information – finding a "viable concern" that statements of the latter groups could constitute admissions. NAACP v. State of Florida, 122 F.Supp.2d 1335 (M.D. Fla. 2000). That Court ruled that if it is determined upon inquiry that the former employee is still associated with the organization, the contact must terminate immediately. 122 F.Supp.2d at 1340. "By 'associated with'," it clarified, "the Court is referring to those former employees who

[10] The Clark opinion suggests that a blanket rule would require a former employee, whose interests are "not necessarily coterminous" with the interests of the organization, to accept the organization's representation. 440 Mass. at 277 n.9, 797 N.E.2d at 910 n.9. I do not agree that they would be *required* to accept representation; however, New Jersey's revised Rule 1.13 addresses this contention by providing that "[f]ormer agents and employees who were members of the litigation control group shall presumptively be deemed to be represented in the matter by the organization's lawyer but may at any time disavow said representation." See Andrews, supra, 191 F.R.D. at 77.

I do agree with Clark's warning, however, that "immunizing former employees from [] *ex parte* interviews would permit the organization to monitor the flow of [potentially privileged] information," 440 Mass. at 278, 797 N.E.2d at 911, but I wonder who would be harmed by giving an organization's counsel an opportunity to consult with those who can bind the organization before they are interviewed by opposing counsel. Former employees usually want to understand whether something they did or did not do while employed may lead to liability. If the answer is "yes," they want to know whether they will be protected. Finally, they want to know whether they may speak freely to anyone about the matters at issue, which is something either the organization's counsel or its opposing counsel can explain, but it is the organization's counsel who is more likely to understand any work product or attorney-client privilege issues that exist. Further, it is the organization's counsel who may, and should, counsel former employees that any non-privileged admissions they made during employment are discoverable and that they may, indeed, be significant to the resolution of the case.

may have been members of management or 'high-level' employees who had access to privileged or confidential communications/information, participated in decision-making activities, and/or worked with the attorneys representing the [organization]." Id. at 1340 n.6.

Should the Supreme Court of Appeals of West Virginia be presented with a case in which an *ex parte* interview of a former employee implicates the attorney-client privilege, undercuts an ongoing attorney-client relationship, or elicits testimony that binds a defendant organization (the former employer) – and if any of that happens, it should be – it may see fit to refine CAMC v. Zakaib, finding that Rule 4.2 does not *have* to be the source of any limitations imposed or that Rule 4.2, by implication and logical extension, makes the anti-contact rule applicable to former employees/constituents under certain circumstances. What can you do in the meantime?

- Identify all former employees who have knowledge of the matters at issue;
- Determine which of them had a hand in directly, or by directing, the alleged act or omission;
- Figure out whether they ever talked to the organization's counsel about the matters at issue;
- Locate any statements they gave about the matters at issue;
- Find out from the organization if you may jointly represent the non-rank and file former employees if necessary;
- Ask whether former owners or employees retained any contractual liability;
- Find out whether cooperation agreements exist;
- Contact the former employee;

- Decide whether the former employee has an ongoing agency or fiduciary relationship with organization, or whether his acts or omissions could be imputed to organization for purposes of its civil liability;

- Advise current and former employees that they do not have to talk informally with opposing counsel and that they may refuse or ask that you be present;

- Determine whether former employees want you to represent them in the matter;

- Describe in discovery responses the former employee's position and involvement, putting your opposing counsel on notice of your awareness of their involvement;

- Place your opponent on notice if it is your position that a current or former employee should not be contacted *ex parte* and why, e.g.:

    - Attorney-client privileged conversations with you (as his counsel);

    - Attorney-client privileged conversations with the organization's lawyer while employed;

    - Access to attorney-client privileged information related to case during employment;

    - Alter ego of organization; ability to bind company to liability through doctrine of *respondeat superior*;

    - Having made an admission during employment that would be reportable during an *ex parte* interview (see fn. 5, Zakaib);

- Encourage opposing counsel who disagrees with your position that she should seek a judicial opinion before engaging in *ex parte* contact.

Protecting your organizational client does not give you license to violate the discovery rules, but there are things you can do to protect your client's attorney-client privilege and to see to it that your client's former constituents whose past conduct could bind the organization are protected from predatory or, more likely, simply lax practices by opposing counsel who do not think carefully through the rules before attempting to

interview them. Since your opposing counsel should have investigated the claim before asserting it, your organizational client often starts the litigation a few laps behind. Your best approach is getting immediately into your investigation, learning as soon as you can what happened and who was involved; exercising vigilance to understand the case law and ethical rules that govern in this troublesome area; contacting key former employees and seeking their cooperation quickly; and communicating to opposing counsel your well-reasoned expectations so that compromise and cooperation can be attained.